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No. 130

Supreme Court of the United States

OCTOBER TERM, 1964

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES, *Appellee,*

and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF INTERVENOR-APPELLEES SOUTHERN RAILWAY COMPANY AND CENTRAL OF GEORGIA RAILWAY COMPANY TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT AND BRIEF IN SUPPORT THEREOF

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August 12, 1964

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Pursuant to Rule 43(4), intervenor-appellees Southern Railway Company and Central of Georgia Railway Company move that consideration of the Jurisdictional Statement be deferred pending disposition by the United States District Court for the Eastern District of Virginia of a related proceeding, *Southern Ry. v. United States*, Civil Action No. 3276. Intervenor-appellees also ask that their time for responding to

the Jurisdictional Statement be extended to and including a date thirty days after disposition in the District Court of *Southern Ry.* v. *United States, supra*.

The grounds of this motion, set forth more fully in the attached Brief in support thereof, are that the issues are not yet ripe for decision on this appeal and that the effective administration of justice would be served by the requested deferral, in that appellants' position on Questions 1 and 2 of the three Questions Presented in their Jurisdictional Statement was not presented in the Court below, and as shown on the face of the Jurisdictional Statement (J.S. 4, 5, 11, 12, 17, 19), is based largely upon matters which occurred after the judgment of the Court below. These include a Supplemental Order of the Interstate Commerce Commission, issued without notice or hearing, which purports to clarify the orders that are the subject of this appeal but which intervenor-appellees contend changes the substance of those orders. The validity and effect of that Supplemental Order are now on judicial review before the same Court below in *Southern Ry.* v. *United States, supra* (J.S. 17).

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN SUPPORT OF MOTION TO DEFER CONSIDERATION OF JURISDICTIONAL STATEMENT

Intervenor-appellees Southern Railway Company and Central of Georgia Railway Company submit this Brief in support of their Motion to Defer Consideration of Jurisdictional Statement.

STATEMENT OF THE CASE

This case began when intervenor-appellee Southern Railway Company (Southern) filed an application with the intervenor-appellee Interstate Commerce Commission on December 15, 1960 for permission under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), to acquire control of intervenor-appellee Central of Georgia Railway Company (Central). (Southern and Central are sometimes hereinafter referred to as "the railroads" or "the carriers.") Extended hearings and three separate decisions by the Commission followed. A great number of facts developed at these hearings are no longer in issue. It will be helpful to have the background facts in mind when considering the narrow challenge asserted by this appeal.

Central is a small railroad. For most of the last 32 years it has been controlled either by a receiver, a trustee in bankruptcy, a voting trustee, or stock speculators. It was subject to overwhelming competition from a number of surrounding major railroads. See *Southern Ry.-Control-Central of Georgia Ry.*, 317 I.C.C. 557, 560-62 (1962) (the Report of the I.C.C. in this case). Central had, in fact, become a marginal carrier and had been forced to give up necessary programs of equipment modernization and maintenance. *Id.* at 560. In spite of the fact that Central was not keeping pace with technological developments in the industry, unemployment on its lines was increasing 35% faster than the industry average, because of its reduced earnings.

The evidence showed that Southern planned to operate Central as a separate railroad and that none of Central's lines would be abandoned. Southern also planned many improvements, technological and other-

wise, in Central's operations. For example, the work of Central's manual accounting department would be transferred to Southern's modern computers, and the work of Central's uneconomical flat switching yards at Atlanta and Chattanooga would be transferred to Southern's electronic yards at those cities. A mass of evidence showed that consolidation of certain yards, shops, agencies, accounting department, and other facilities of Central with Southern's would greatly benefit Central in terms of greater efficiency, better service, and greater economy. *Id.* at 579-80.

Prior to hearing, Southern and Central voluntarily consented to the imposition of labor-protective requirements that, it was estimated, could cost as much as $5 million a year for four years. This money would go to an estimated 818 employees whose jobs would become superfluous as a result of the transfers of work planned.

Southern's application was opposed by one of the appellants herein, Railway Labor Executives' Association (RLEA). RLEA took the position, first, that for Southern to acquire control of Central would not be in the public interest, and that the acquisition should be disapproved *in toto*. In the alternative, RLEA asked for the imposition, under Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), of certain employee-protective conditions in addition to those already agreed to by Southern. RLEA proposed, *inter alia*, that any consolidation of facilities take place only with the consent of, or after notice to and conference or arbitration with, the affected employees or their representatives. This proposal, in substance, was for inclusion of the procedural provisions of Sections 4 and 5 of a document denominated "Agreement of May, 1936, Washington, D. C.," commonly

called the Washington Agreement. See Jurisdictional Statement (J.S.) 7-9. RLEA also asked for the imposition of the equivalent of Section 9 of the Washington Agreement, which requires that benefits to affected employees be paid, at the employees' option, in a lump sum instead of over a period of time.[1]

On February 21, 1962, the Hearing Examiner served his Recommended Report. He found that the economies resulting from the proposed consolidation would be in the public interest, and recommended that the acquistion of control be approved. He recommended the imposition of certain employee-protective conditions—substantially those already agreed to by Southern. He did not recommend the imposition of conditions similar to Sections 4, 5, and 9 of the Washington Agreement.

Thereafter, the Commission itself reviewed the Examiner's findings. On November 7, 1962, the Commission's unanimous Report approving the transaction was issued. It found that Southern's control of Central would promote the public interest in sound and reliable railroad transportation. Central, the Commission held, was a marginal carrier with a future at best doubtful. The vast majority of Central's employees, it said, would be benefited by Southern's control:

> "While the number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination such

[1] In its papers (*e.g.*, J.S. 4) RLEA sometimes refers to these provisions of the Washington Agreement as the "New Orleans" conditions. The reference is to the decision of the I.C.C. in *New Orleans Union Passenger Terminal*, 282 I.C.C. 271 (1952). Southern and Central, however, do not agree that these provisions of the Washington Agreement were imposed in *New Orleans*.

as that planned, the average number of persons employed by Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all employees of Central is far from bright unless this trend can be arrested. Affiliation of Central with applicant will strengthen its ability to render adequate and efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency" (J.S. 10a-11a).

For the benefit of those employees who would be dismissed or displaced, the Commission imposed a thoroughgoing system of protective conditions. It did not, however, impose Sections 4, 5, and 9 of the Washington Agreement. The conditions imposed were "set forth in Appendix II" of the Commission's Report of November 7, 1962 (J.S. 20a). As thus set forth, these conditions were in substance as follows:

(1) Employees displaced or dismissed by reason of the acquisition will receive full monetary compensation for four years after the effective date of the Order approving the transaction, or for the period of their service prior to that date, if that period is less than four years.

(2) This compensation will include moving expenses and losses on the sale of homes at less than fair value.

(3) Compensation will also be made for any loss of fringe benefits not shared by all similarly situated employees.

(4) The compensation thus described is a minimum; any employee who at the end of the four-year protective period shall have received less compensation than the total amount he would have received under the Washington Agreement, shall thereafter continue to receive additional com-

pensation until the difference shall have been paid.[2]

(5) At RLEA's request, any dispute over the application of these conditions will be subject to compulsory and binding arbitration.[3]

Thereafter, the appellant RLEA petitioned the Commission for reconsideration. Southern also petitioned for reconsideration and for clarification of ambiguities in the Commission's initial Report, particularly in respect of the conditions' applicability to employees adversely affected not by the consolidation of facilities itself, but by internal modernization and economies occurring after the consolidation. On reconsideration, RLEA's requests were denied *in toto* (J.S. 9a). Southern's petition for certain changes was also denied, but its petition for clarification was granted in a second Report and Order issued on June 10, 1963. The Commission explained that it had not meant by its first Report to hamstring Southern's and Central's future technological progress—progress that might well have come about apart from Southern's acquisition. It said:

> "It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and the Central or by the shifting of

[2] This provision is primarily for the benefit of employees who are not affected until some time after the Order of approval. See the Commission's discussion of the Washington Agreement in this context, at J.S. 13a.

[3] The text of the conditions thus imposed, contained in Appendix II of the Commission's November 7, 1962 Report, is set forth at J.S. 20a-27a. The conditions were made effective, subject to petition for reconsideration, by a Commission Order issued on December 3, 1962.

functions from one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; . . ." J.S. 33a.

Subject to this and other modifications not here relevant, the Commission then reaffirmed its prior Report and Order.

Promptly after receipt of this second Report and Order, on June 17, 1963, Southern acquired control of Central, and the two railroads proceeded forthwith, in compliance with and in reliance upon the labor conditions imposed by Appendix II of the original Report, as modified by the second Report, to accomplish the proposed eliminations of duplicate facilities and to reassign employees accordingly. First of all, over $30,000,000 was paid by Southern as the purchase price of Central of Georgia stock. In discharge of the labor obligations accepted by virtue of such consummation, there was paid between that date and February 27, 1964, over $750,000 in connection with the employee benefits for Central employees specified in Appendix II; since February 27, 1964, monthly payments totaling to date an additional $168,000 have been made regularly, pursuant to such conditions. The significance of the date February 27, 1964, is that on that date the Interstate Commerce Commission issued a third report and order, which is referred to in this motion as the "Supplemental Order," details of which are stated below. The planned eliminations of duplicate facilities have been completed. All of the approximately 1300 employees affected by the transaction have been paid all benefits to which they are entitled to date under

those conditions. In addition to the foregoing, over $2,000,000 in voluntary lump-sum settlements has been paid to employees entitled to benefits under the Commission's Order, and some 89 other affected employees have resigned or retired under the Railroad Retirement Act. Substantial additional sums have been expended in reimbursements for travel, moving expenses, sale of homes, and the like for approximately 175 employees who have been transferred to other locations. The Commission not having imposed Sections 4 and 5 of the Washington Agreement, Southern and Central did not delay these actions in order to seek agreement or arbitration with employee representatives.[4] If, at the time of consummation, Sections 4 and 5 of the Washington Agreement had been applicable, neither the eliminations of duplicate facilities, the selection and assignment of forces at the Southern facilities, nor the payment of benefits to the affected employees would have been made until completion of the negotiations and arbitrations called for by those Sections.

On July 9, 1963, RLEA and the two individual appellants brought this suit in the United States District Court for the Eastern District of Virginia to set aside the Commission's Report and Order of June 10, 1963. Pursuant to 28 U.S.C. §§ 2321-25, a statutory three-judge court composed of Circuit Judge Bryan and District Judges Lewis and Butzner was convened to hear the case. RLEA did not contend, as it had before the Commission, that Southern's acquisition of Central was not in the public interest. That argument was abandoned. Appellants contended only that the employee-protective conditions were inadequate to meet

[4] Evidence of these actions taken pursuant to the authority granted by the Commission's Order of June 14, 1963 will be offered in Southern Ry. v. United States, *supra*.

the requirement of Section 5(2)(f). Although they had not raised the questions in their Petition for Reconsideration before the Commission (or in their Exceptions to the examiner's Recommended Report and Order), they argued that Section 5(2)(f) required the Commission to impose Sections 4, 5, and 9 of the Washington Agreement, and that the Commission's Order was invalid by reason of its failure to do so. They also argued that Section 5(2)(f) required the Commission to make its conditions applicable to employees affected by internal economies effected after the consolidation in question.[5] The Commission, Southern, and Central intervened as parties defendant. They each took the position that the conditions imposed by the Commission were not unlawful in any respect—either by reason of their failure to impose Sections 4 and 5 of the Washington Agreement, or for any other reason. Southern and Central also took the position that Sections 4 and 5 had not been properly raised before the Commission. Brief for Intervenor-Defendants Southern and Central p. 11 n. 23.

The District Court (per Lewis, J.) unanimously upheld the Commission's June 10, 1963 Report and Order against every challenge made by appellants. In its opinion issued on January 31, 1964, it first noted that

> "R.L.E.A. centers its attack upon the refusal of the Commission to impose conditions which would:
>
> "(a) Require proposed consolidation of facilities resulting from the transaction be with the consent of, or after arbitration with, representatives of employees of both carriers . . ." J.S. 4a.

[5] RLEA also made several other attacks on the Commission-imposed conditions, but it has raised none of these points on this appeal.

The Court rejected this contention. It said:

> "To hold otherwise would deprive the Commission of its statutory duty of imposing fair and equitable conditions predicated upon its evaluation of the facts of record relating to each individual transaction. We hold the conditions imposed in this case are fair and equitable and meet the minimum requirements of the statute." J.S. 6a.

It also rejected the contention that the Commission had abused its discretion or exceeded its statutory powers by holding "that certain adverse effects attributable to internal technological improvements create no liability under Section 5(2)(f)" (J.S. 7a). On the same day, January 31, 1964, the Court entered judgment concluding "that the orders of the Interstate Commerce Commission herein complained of . . . are not erroneous," and dismissing appellants' complaint (J.S. 1a).

Thereafter, before appellants' time for appealing to this Court had run, and while the District Court still had jurisdiction of the cause,* the Interstate Commerce Commission, on February 27, 1964, issued a third Report and Order (J.S. 39a-46a). This action was taken *sua sponte* (J.S. 11). Neither Southern nor Central was given advance notice. No opportunity for a hearing was afforded. This third Report and Order pur-

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*28 U.S.C. § 2101(b) fixes the time for filing a notice of appeal at 60 days from the entry of judgment in the District Court. Appellants actually filed their notice on March 30, 1964, the 59th day. It is the filing of the notice of appeal that divests the District Court of jurisdiction and confers jurisdiction of the cause upon this Court. See Rule 10(1) of this Court; Schempp v. School District of Abington Township, 184 F. Supp. 381 (E.D. Pa. 1960); School District of Abington Township v. Schempp, 364 U.S. 298 (1960) (per curiam).

ported to announce that the Commission had all along "intended" to impose the Washington Agreement, including Sections 4, 5, and 9 thereof, as part of its labor-protective conditions, except where expressly modified. The Commission thus repudiated statements of its own Counsel before the District Court (J.S. 39a-40a), affected to overrule the judgment of that Court in large part, and attempted retroactively to impose additional conditions on an already consummated transaction.[7] Although Commission counsel informed the District Court by letter of this action (J.S. 11), no effort was made, under Fed. R. Civ. P. 60(b)(6), or otherwise, either by the Commission, by the United States, or by appellants, to secure any alteration of the Court's construction of the Commission's prior Reports and Orders, or to modify or reopen the Court's judgment. Instead, appellants simply proceeded on March 30, 1964, to file a notice of appeal to this Court. In their Jurisdictional Statement (*e.g.*, J.S. 11, 17 & n.7) they seek for the first time to derive advantage from the Commission's third Report and Order.

Southern and Central, however, did take action with respect to the Commission's surprise Report and Order. On April 15, 1964, they filed suit in the Court below to set aside the Commission's action of February 27. *Southern Ry.* v. *United States*, C.A. 3276, E.D. Va. A three-judge court consisting of the same judges who sat below in this case was convened. The United States, the Commission, and RLEA have filed answers in this new case. The complaint attacks the Commis-

[7] The Commission's action was also contrary to repeated administrative interpretations of its prior Reports and Orders, including an official expression by Chairman Murphy only 20 days after service of the November 7, 1962 Report. Evidence of these interpretations will be offered in Southern Ry. v. United States, *supra*.

sion's latest action on several grounds. Among the contentions it makes are the following:

(1) The Commission imposed only those conditions it listed in Appendix II of its Report of November 7, 1962, as modified by the Report and Order of June 10, 1963.

(2) The Report and Order of February 27, 1964, which attempt to enlarge and modify the conditions thus imposed, are null and void because, *inter alia,*

(a) they retroactively impose new and onerous additional conditions upon a consummated transaction, contrary to Section 5(2)(f) and the Due Process Clause of the Fifth Amendment;

(b) they were issued without notice or hearing, contrary to Section 5(2)(f), Section 5 of the Administrative Procedure Act, 5 U.S.C. § 1004, and the Due Process Clause of the Fifth Amendment.

These questions, and others raised by Southern's and Central's new suit in the Court below, are now being briefed for that Court's decision. The hearing in that Court is scheduled for September 9, 1964.

ARGUMENT

Southern and Central apologize for the length of the foregoing Statement of the Case. But a full statement is, it is believed, necessary to enable this Court to understand the place of this appeal in the entire context of this complicated litigation. When this context is viewed as a whole, it becomes apparent that the appeal is not yet ripe for decision. As presented by the Jurisdictional Statement, the case is inextricably bound up with issues that have not yet been passed on by the

Court below, but that will be dealt with by that Court shortly in *Southern Ry.* v. *United States*, C.A. 3276.

1. The Jurisdictional Statement attempts to present three questions for decision. The first question assumes that the Commission's Report concluded that the terms of the Washington Agreement should be imposed as labor conditions and then implies that the Order is invalid because in disregard of this conclusion the Order "deleted certain basic protections" found in that agreement (J.S. 4). The second question turns out to be another way of stating the first.[8] In it RLEA in effect contends that the Commission's Order is so vague and confusing as to be invalid because the labor conditions imposed by the Order are contrary to the Commission's asserted "conclusion" (J.S. 4-5). The railroads' position on the merits of these two questions is simple. The Commission's first two Reports and Orders are wholly clear and self-consistent. They impose, in accordance with the Commission's findings and conclusions, many of the provisions of the Washington Agreement. Some provisions thereof they do not impose—notably Sections 4, 5, and 9. The conditions imposed are clearly set out for all to see in Appendix II of the Report of November 7, 1962.

But these issues, whatever their ultimate resolution, are not yet ripe for decision on this appeal. Both of these issues depend to a large extent on the validity and effect of the February 27 Commission order—

[8] The third question presented, having to do with the effects of technological improvements, admittedly is not involved in the carriers' suit against the Order of February 27, 1964, and is now ripe for adjudication by this Court. But since the first two questions are not yet ripe, the Court may properly defer consideration of the third question as well, in order to avoid piecemeal adjudication.

questions that could have been but were not presented to the District Court. Both of these issues are involved in Southern's and Central's new suit in the Court below. Evidence will be offered in that Court showing the substantial change of circumstances during the eight months intervening between the issuance of the Orders involved in this appeal and the Supplemental Order. These questions will presumably be decided by that Court in due course—perhaps even before this Court's 1964 Term begins. *Cf. Hudson Distributors, Inc.* v. *The Upjohn Co.*, 32 U.S.L. Week 4420, 4422 (U.S. June 1, 1964) (questions raised by a cross-petition in the lower courts "are not properly before us. They are pending and unresolved in the Court of Common Pleas, Cuyahoga County."); *United States* v. *Wabash R.R.*, 322 U.S. 198 (1944) (Stone, C.J.). Obviously, moreover, it will be much more convenient for this Court to deal with the complex problems presented by the Jurisdictional Statement after it has had the benefit of a District Court opinion discussing them. *Cf. Erie R.R.* v. *Tompkins*, 304 U.S. 64, 80 & n. 24 (1938); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 663 (1964) (Harlan, J., concurring in part). And finally, it would be manifestly unfair to the District Court for its judgment to be reviewed on issues that RLEA never presented to it, but that now are pending before it on the complaint of Southern and Central. Ordinary appellate practice and wise judicial administration alike counsel that the time for this Court to decide these two questions will not have arrived until the District Court has passed on both of them.

2. In this situation, it is submitted that the proper course is to defer consideration of the Jurisdictional

Statement until the Court below has disposed of Civil Action No. 3276. *Cf. Aristeguieta* v. *First Nat'l City Bank*, 368 U.S. 804 (1961), postponing consideration pending developments in lower courts that were expected to moot the cause. As noted, that Court has scheduled argument for September 9. There is reason to believe that the District Court will proceed to decision with reasonable dispatch. Judge Lewis so indicated at the hearing on a joint motion for alteration of briefing schedule. This Court would not dispose of the Jurisdictional Statement in any event until the second Monday in October, October 12. So the delay sought by Southern and Central would not, in all likelihood, be substantial. It would, so far as we are aware, work no injury to any other party. After the District Court has acted, this Court will have a lower-court opinion on the effect of the latest Commission Order, and the District Court will have received the courtesy of being permitted to decide questions in the first instance. At that time Southern and Central will be in a position to respond to the Jurisdictional Statement. They will do so within any time fixed by this Court; thirty days is merely mentioned in the Motion to Defer Consideration of the Jurisdictional Statement by way of illustration. Thereafter, if the District Court's judgment in No. 3276 is appealed to this Court, that case can either be consolidated with this one, or otherwise treated as the Court may deem best.

It is not suggested, of course, that this Court lacks power to proceed to dispose of the Jurisdictional Statement on all issues. Southern and Central merely submit that deferral of consideration for the limited time suggested will serve the effective administration of justice, will enable this Court to decide the present

appeal more knowledgeably, and will not injure any party.

Respectfully submitted,

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